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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 678.

SMOOT SAND AND GRAVEL CORPORATION, *Petitioner,*

vs.

WASHINGTON AIRPORT, INCORPORATED, *Respondent.*

BRIEF FOR RESPONDENT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR RESPONDENT.

STATEMENT OF CASE.

This action was commenced by Washington Airport, Incorporated, the respondent here, against the Smoot Sand and Gravel Corporation, the petitioner, to enjoin petitioner from dumping sand, gravel, rock, and debris upon certain tide land upon the Virginia side of the Potomac River opposite the District of Columbia, it being alleged that this tide land belonged to respondent. The action was originally commenced in the Virginia State Court and removed to the United

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Note: Italics supplied wherever used.

States District Court for the Eastern District of Virginia.

The defendant in the District Court, petitioner here, filed a motion to dismiss the complaint upon the ground that the Court had no jurisdiction over the subject-matter of the action for the reason that the tide land in controversy was not within the boundaries of the District of Columbia. The District Court sustained this motion and dismissed the bill. Upon appeal, the Circuit Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and held that the tide land was within the State of Virginia and that therefore the District Court has jurisdiction. This Court granted certiorari.

SOLE QUESTION PRESENTED.

The sole question presented in this case is whether the land, lying between the ordinary high and low water marks on the Virginia side of the Potomac River and opposite the District of Columbia, is in the State of Virginia or in the District of Columbia. The answer to this question involves a determination of the boundary between the District of Columbia and the State of Virginia.

SUMMARY OF ARGUMENT.

I.

The grant by King James of England to the Commonwealth of Virginia in 1609 included not only all of the present State of Virginia but all of Maryland, parts of Pennsylvania and parts of North and South Carolina, as well as territory further West. It necessarily included all of the Potomac River. The grant

to Lord Baltimore in 1632 conflicted with the above grant by including the territory of Maryland and also all of the Potomac River. The grant to Lord Culpeper in 1660 of the northern neck of Virginia also included the Potomac River. The overlapping of these grants resulted in continuous conflict between Maryland and Virginia as to the boundary between the two States.

II.

By the Virginia Constitution of 1776, Virginia gave up her claim to the territory of Maryland, Pennsylvania, and North and South Carolina, but reasserted her claim to the entire Potomac River. By the Compact of 1785, Virginia surrendered her claim to the tide land of the Potomac on the Maryland side of the river and Maryland surrendered her claim to the tide land of the Potomac on the Virginia side of the river; but both States still continued to claim the entire river except for the shores on either bank.

III.

The Compact of 1785 did not settle the boundary between Maryland and Virginia because each State still claimed the river itself and, moreover, Maryland claimed jurisdiction over the numerous water indentations on the Virginia side of the river, many of which ran for miles into the interior of the State of Virginia. Nevertheless, this Compact did settle certain questions which had been theretofore disputed as to the boundary. It did settle that Virginia had no further claim to the high water mark on the Maryland side, but only to the low water mark; and it did

settle that Maryland had no further claim to the high water mark on the Virginia side, but only to the low water mark.

IV.

In 1791 Maryland and Virginia ceded to the United States a territory ten miles square reaching entirely across the Potomac River. This territory so ceded originally comprised the territory within the District of Columbia. In 1846 the United States regranted to Virginia the exact territory which Virginia had granted to the United States. This left the District of Columbia consisting solely of the territory which had been conveyed by the State of Maryland.

V.

Inasmuch as Maryland in 1785 had waived all claim to territory beyond the low water mark on the Virginia side, when it conveyed to the United States in 1791 it obviously could not convey the tide land which it had already ceded to Virginia. Therefore, the territory conveyed by Maryland to the United States was bounded by the low water mark on the Virginia side of the river.

VI.

While it has never been definitely determined that the grant to Lord Baltimore reached across the Potomac to the high water mark on the Virginia side, still, conceding that that grant did reach to the high water mark and therefore included the land between the high water mark and the low water mark on the Virginia side, Virginia never acquiesced in

that claim and continually asserted her rights not only to the low water mark but to the whole of the Potomac River until the Arbiters' Award of 1877, when the boundary between the two States was fixed at low water mark on the Virginia side. This Award also stated that the boundary should run from low water mark at one headland to low water mark at the next headland, thus leaving the indentations within the jurisdiction of Virginia. The Award had two principal phases: first, fixing the boundary at low water mark, and second, running the boundary straight across the mouth of all indentations from one headland to the next.

VII.

The decision of the Arbiters that the Maryland boundary did not extend beyond low water mark was based, not upon prescription, not upon historical events, but was based entirely upon the Compact of 1785. The decision of the Arbiters that the boundary should run from low water mark at one headland to low water mark at the next headland, was not based upon the Compact of 1785, because that Compact contained nothing concerning headlands, but was based entirely upon prescription, historical events, and the impractical results and inconvenience of administration which would have followed had Maryland been allowed to follow the low water mark around such indentations into the State of Virginia.

VIII.

This Court, in the case of *Maryland vs. West Virginia*, 217 U. S. 577, definitely held that the Arbiters'

Award of 1877, fixing the boundary at low water mark, was based upon the Compact of 1785, and further held that the Arbiters' decision was correct and that the Compact of 1785 was a concession by Maryland that its territory did not reach beyond the low water mark. There is nothing inconsistent with this decision in any decided point in the case of *Morris vs. United States,* 174 U. S. 196, nor in the case of *Marine Railway vs. United States,* 257 U. S. 47. In the Morris case, the only land in controversy was on the District of Columbia side of the Potomac River, and while the Court said that the grant to Lord Baltimore conveyed title to the high water mark on the southerly bank of the Potomac, that statement was not necessary to the decision of the Court. But conceding that it be a correct statement as to the effect of the grant, the Court did not have under consideration the Compact of 1785 nor the effect of that Compact upon the boundary. When the Court, in the latter case of *Maryland vs. West Virginia,* 217 U. S. 577, came to the consideration of the effect of the Compact of 1785, it directly held that that Compact was a concession by Maryland that its boundary did not extend beyond the low water mark.

IX.

Neither does the case of the *Marine Railway vs. United States,* 257 U. S. 47, conflict in any manner with the Maryland-West Virginia decision. In that case, the land involved was out in the main body of the river, beyond the low water mark, so that the question as to whether the boundary was low water mark or high water mark was not involved. It was contended, however, that as this land lay within one

of the indentations on the Virginia side of the river, and as the boundary between Maryland and Virginia had been fixed by the Arbiters' Award of 1877 as running from headland to headland, that therefore this land was within the States of Virginia. This Court, however, stated that the Compact of 1785 had not determined that the boundary ran from headland to headland, and that the subsequent Arbiters' Award of 1877 to that effect was based, not upon the Compact, but upon later historical events, and that the rights of the United States, which were fixed long prior to the Award of 1877, could not be affected by that Award to which it was not a party. The Court did not undertake in any manner to say that the Compact of 1785 was not a concession by Maryland that its boundary did not extend beyond the low water mark.

X.

Maryland having conceded, by the Compact of 1785, that its boundary did not extend beyond the low water mark, its conveyance to the United States in 1791 could only carry to the low water mark. Virginia's conveyance to the United States also carried to the low water mark; and when the United States reconveyed to Virginia in 1846 the exact territory which Virginia had conveyed to the United States, it necessarily conveyed back to Virginia everything beyond the low water mark. This being true, the land in controversy in this case is within the boundaries of the State of Virginia and the decision of the Court of Appeals should be affirmed.

ARGUMENT.

Conflicting Grants.

Original Grant to Virginia:

The first grant with which we are concerned was dated May 23, 1609. By this grant King James of England granted to the Commonwealth of Virginia a tract of land which not only included all of the present States of Virginia and Maryland, but also included portions of Pennsylvania, North Carolina and South Carolina, as well as other lands farther west.

This grant by its express terms included the whole of the Potomac River, as well as the State of Maryland. The particular language in the grant which included the Potomac River and Maryland is as follows:

> "All the territory from the point of land called Cape or Point Comfort, all along the seacoast to the Northward two hundred miles."

Grant to Lord Baltimore:

Twenty-three years subsequent to the grant to the Commonwealth of Virginia and on June 20, 1632, Charles I, King of England, made a grant to Lord Baltimore, which included substantially what is now the State of Maryland. This grant also, by its express terms, included the whole of the Potomac River. The southerly boundary of the grant was, in part, described as follows:

> "To the farther bank of said river (Potomac) and following it."

Grant to Lord Culpeper:

Twenty-eight years subsequent to the grant to Lord Baltimore, King James II, of England, on January 27, 1660, made a grant to Lord Culpeper of what was known as the "Northern Neck of Virginia." This grant also, by its express terms, included the Potomac River, the exact language being:

> "the Potomac River and all the islands within the outermost banks thereof."

Copies of these grants may be found in *Thorpe's Charters* and *Constitutions.*

All Three Grants Included the Potomac River.

These three grants were highly conflicting. The grant to Lord Baltimore conflicted with the original grant to the Commonwealth of Virginia by covering a large part of the territory in the original grant. The third grant, to Lord Culpeper, conflicted with the grant to Lord Baltimore because each grant, by express terms, included the Potomac River. In fact, each one of the three grants covered the whole of the Potomac River, and thus each grant conflicted with each of the others.

Following these conflicting grants, it was inevitable that many controversies should arise. Various phases of these controversies were adjusted from time to time, and various concessions were made by the States interested.

Various Statutes, Concessions and Agreements Affecting the Boundary Between Maryland and Virginia.

Earliest Statutes of Virginia claimed Tide Lands:

From the very earliest times down to the present, Virginia has consistently dealt with the tide lands as if those tide lands were within its jurisdiction. The first statute, passed in 1679, is found in 2 *Henning's Statutes,* p. 456. It is as follows:

> "It is ordered and declared by this grand assembly that every man's right by vertue of his pattent extend into the rivers or creekes soe farre as low water marke, and it is a privilege granted to him in and by his pattent, and that therefore noe person ought to go and ffish there above low water marke or hale their sceanes on shoare (without leave first obtained) under the hazard of permitting a trespass for which he is sueable by law."

In 1669, Virginia made a grant of a tract of land, including the land in controversy, to one Howsing. This grant, by its terms, was bounded by the Potomac River. Ten years later, the above Statute (*2 Henning's,* 456) was passed providing that the owner of land bordering on any river or creek should own the land down to the low water mark. At various times since the passage of this original Act, the legislature of Virginia has adopted similar laws, and the Supreme Court of Appeals of Virginia has repeatedly held that the owner of the upland is also the owner of the adjoining tide lands, not that the owner has a mere right or easement in such tide lands, but that he owns an absolute title thereto.

Taylor v. Commonwealth, 102 Va. 759.
French v. Bankhead, 11 Grat. 136.
Steelman v. Field, 142 Va. 383.

Virginia Constitution of 1776, While Making Many Concessions, Asserted Title to Tide Lands:

On June 29, 1776, the Commonwealth of Virginia adopted a Constitution which surrendered the claims of Virginia to the territory of Pennsylvania, Maryland, North Carolina and South Carolina. But the same clause of the Constitution, which surrendered the claims of Virginia to the territory embraced within these several States, asserted Virginia's right to the Potomac River and to the tide lands along said river. The particular provision of the Virginia Constitution of 1776 covering this matter is as follows:

> "The territories contained within the charters, erecting the colonies of Maryland, Pennsylvania, North and South Carolina are hereby ceded, released and forever confirmed, to the people of these colonies respectively, with all the rights of property, jurisdiction and government, and all other rights whatsoever, which might, at any time heretofore, have been claimed by Virginia, except the free navigation and use of the rivers Potomoque and Pokomoke, *with the property of the Virginia shores and strands,* bordering on either of said rivers, and all improvements which have been or shall be made thereon."

While in this Constitution Virginia expressly surrendered her claim to the territory of Maryland, it expressly excepted from such surrender the Potomac River, including the tide land along that river. The words "shores and strands", as will be hereinafter shown, when applied to tidal water, means the land

covered and uncovered by the ordinary flow and ebb of the tide. So that when Virginia conceded to Maryland her claim to practically the entire territory covered by the charter of Maryland, she did not concede the Potomac River nor the tide lands, but expressly reserved the River and the tide lands from such concession.

Virginia Code also follows Constitution in asserting Virginia's claim to shores of Potomac:

Following the Constitution, the legislature of Virginia passed a law which is now embodied in Section 9 of the Virginia Code. The pertinent portion of this section of the Code is as follows:

> "And the people of Virginia, when they adopted their Constitution or form of government, on the twenty-ninth of June, seventeen hundred and seventy-six, having by the twenty-first section thereof ceded, released, and confirmed to the people of Maryland, Pennsylvania, North and South Carolina, such parts of the territory of Virginia as were contained within the charters erecting those colonies, with all the rights in those parts which might theretofore have been claimed by Virginia, except the free navigation of the rivers Potomac and Pocomoke, *with the property of the Virginia shore or strands bordering on either of the said rivers,* and all improvements thereon; * * *"

Compact of 1785:

Subsequent to the adoption of the Virginia Constitution, there was still a conflict between the States

of Maryland and Virginia as to jurisdiction over the Potomac River, and the tide lands along that river. The question as to which State had jurisdiction over the river, and therefore could impose duties upon ships sailing thereon, and also which State had jurisdiction over the fishing rights, were frequent subjects of dispute between the two States. These frequent disputes resulted finally in the Compact of 1785. While this Compact deals largely with the question of jurisdiction over the river and the navigation thereof, and the right of fishing therein, it also deals with the territorial claims of the two States and particularly with the ownership of the tide lands bordering the River.

This Compact was in the nature of a compromise, which gave each State equal rights of navigation and fishing. It was also a compromise as to the ownership of the tide lands. By that Compact, each State definitely abandoned its claim to the tide land on the shore of the other State. The particular section of the Compact relating to the shores of the Potomac is Section 7. That section is as follows:

> "Seventh: The citizens of each State, respectively, shall have full property in the shores of the Potomac River, adjoining their lands, with all emoluments and advantages thereunto belonging, and the privileges of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to and equally enjoyed by the citizens of both States; provided, that such common right be not exercised by the citizens of one State to the hindrance or disturbance of the fisheries on the shores of the other state; and that the

citizens of neither State shall have a right to fish with nets or seines on the shores of the other."

Meaning of Word "Shore."

It is to be noted that this section contains the following language:

> "The citizens of each state respectively shall have full property in the shores of the Potomac River, adjoining their lands. * * *"

The word "shore" means the ground between ordinary high-water and ordinary low-water mark.

In *Shively v. Bowlby*, 152 U. S. 1, the court, at page 12 of the opinion, quoted with approval from Hargrave's Law Tracts, as follows:

> "The shore is that ground that is between the ordinary high water and low water mark."

There can be no doubt that the word "shore" means the land between the low-water and high-water mark. For a collection of cases showing that this is the true definition, see Words and Phrases, Second Series, Vol. 4, p. 575.

It therefore follows that when the State of Maryland agreed in the Compact of 1785 that the citizens of Virginia should have full property in the shores of the Potomac adjoining their lands, it was a waiver by the State of Maryland of whatever claim it had to the land lying between the low-water and high-water mark, and this Court so held in the case of *Maryland v. West Virginia*, 217 U. S. 577.

Compact of 1785 was a Waiver by Maryland of all claim beyond the Low Water Mark.

It is true, as this Court pointed out in the case of *Marine Railway Co. vs. U. S.*, 257 U. S. 47, that this Compact did not settle the boundary between the two States. In that case this Court in referring to the Compact said:

> "It says nothing about the boundary in terms"; (p. 63 of Opinion)

and again:

> "it left the question of boundary open to long and continued disputes." (See page 64 of opinion.)

While this Compact did not settle the question of the boundary between the two States, it did go a long way towards settling that question. By this Compact Virginia definitely abandoned any claim beyond the low water mark on the Maryland side of the river, and Maryland, just as definitely, abandoned any claim beyond the low water mark on the Virginia side of the river. But this left each State still claiming the main part of the river. Moreover, it left Maryland still claiming jurisdiction over the many deep bays or water indentations on the Virginia side of the Potomac. These remaining disputes were never settled until the Commissioners' Award of 1877, which was ratified by the two States in 1878. So that, while this Compact "left the question of boundary open to long and continued disputes", it at least settled one question, and that was that Maryland's boundary did not extend beyond the low water mark on the Virginia side.

The language of the Compact, by which each State surrendered its claim to the tide lands upon the shores of the other States is as follows:

> "The citizens of each State respectively, shall have full property in the shores of the Potomac River adjoining their lands with all emoluments and advantages thereunto belonging."

The section then provided for a common right of fishing to be enjoyed by the citizens of both States, but provided that such rights should not be exercised by the citizens of one State to the hindrance of the fisheries on *"the shores of the other State,"* and that the citizens of neither State should have a right to fish with nets or seines *"on the shores of the other."*

This language is a definite recognition that the shores of the Potomac belonged to the adjoining State; indeed, the first provision that:

> "The citizens of each State respectively, shall have full property in the shores of the Potomac River adjoining their lands"

is, in effect, a conveyance or quit-claim by each State of all the rights of such State in the tide lands to the owners of the adjoining upland.

This language does not admit of an interpretation which would permit Maryland to still claim the tide land on the Virginia side. In fact this Court, in the case of *Maryland vs. West Virginia,* 217 U. S. 577, definitely held that this Compact was a concession by the State of Maryland that its boundary did not extend beyond low water mark on the Virginia shore. The language of the Court in that case covering this matter is that the Compact is:

"inconsistent with the claim that the Maryland boundary on the south side of the Potomac shall extend to the high-water mark." (See page 580 of opinion.)

Here is a definite statement by this Court that the language of this Compact cannot be reconciled with a further claim on the part of the State of Maryland to the tide land on the Virginia side.

Compact of 1785 Granted Title to Tide Lands—Not Merely an Easement.

In the Brief filed on behalf of the United States it is repeatedly asserted that the Compact of 1785 merely granted an easement of servitude in the tide lands to the owners of the upland on the Virginia side. For example, on page 15 of the Brief appears the following:

"The Compact of 1785 was a treaty between two sovereign States, dealing with the use of the river upon principles of public law. So long as it remained in force, it merely accorded to Virginia and her citizens rights and privileges in the nature of easements and servitudes in the shore and stream of the Potomac. The privileges accorded to Virginia and her citizens amounted to no more than a recognition of the servitude in the stream which is generally allowed in favor of the citizens or subjects of a neighboring sovereign. A cession of such privileges does not negative the retention of territorial sovereignty or ownership, nor does it change boundary lines."

And again the Brief says:

"The grant of a servitude in the waters and adjacent shore did not in any respect modify the

> boundary as originally fixed at high-water mark by the charter granted to Lord Baltimore."

While it is true that the Compact of 1785 did grant certain easements or privileges to the riparian owners on the Virginia side—for example, the right of carrying out wharves into the main channel of the river—still such easement or privilege had nothing to do with the tide lands. As to these tide lands there was no easement or privilege granted, but the grant was of the entire ownership. The language is:

> "The citizens of each State, respectively, shall have full property in the shores of the Potomac River adjoining their lands."

This is not a grant of a privilege nor a servitude, but is a grant of the full property right; and the statement of counsel that this Compact "did not in any respect modify the boundary as originally fixed at high-water mark by the charter granted to Lord Baltimore" is flatly contradicted by the decision of this Court in the case of *Maryland vs. West Virginia*, 217 U. S. 577, where the Court said at page 580 of the opinion that this Compact was "inconsistent with the claim that the Maryland boundary on the south side of the Potomac River shall extend to high-water mark." (For an analysis of the decision in the case of *Maryland vs. West Virginia*, see *infra* page 21.

Further Controversies as to Boundary After Compact of 1785.

While the Compact of 1785 contained a concession on the part of Maryland that its boundary did not extend beyond the low water mark on the Virginia

side of the Potomac, still that did not settle the controversy in its entirety. On the Virginia side of the River, were numerous deep indentations running for miles into the heart of Virginia. These indentations are tidal in their character, and, if the claim of Maryland to the low water mark were to be literally interpreted, it would necessarily mean that Maryland would have jurisdiction over these indentations for miles into the interior of Virginia. Naturally, Virginia disputed this claim, as well as disputing Maryland's claim to jurisdiction over the main river.

To settle these controversies, the legislature of each State, in 1874, appointed commissioners for the purpose of ascertaining and fixing the boundary between the two States. These Commissioners made an award in 1877, in which they held that the Compact of 1785 had definitely settled that the boundary of Maryland did not extend beyond the low water mark on the Virginia side. The Commissioners further held that the boundary should not follow the low water mark into each one of the many indentations on the Virginia side, but should be drawn from headland to headland, thus leaving all of the indentations within the jurisdiction of the State of Virginia. This latter conclusion was reached by reason of the fact that Virginia had continuously asserted jurisdiction over these inland waters. No doubt the Commissioners were also moved by the absurd results which would have followed if Maryland's claim to the indentations had been sustained.

The Commissioners fixed the boundary at low water mark because Virginia had, from the earliest times, asserted sovereignty over the land down to low water mark, and because, in the Compact of 1785, Mary-

land had conceded the claim of Virginia to the tide lands on the Virginia side. In their report, the Commissioners used the following language:

> "The evidence is sufficient to show that Virginia, from the earliest period of her history, used the South bank of the Potomac as if the soil to low water mark had been her own. She did not give this up by her Constitution of 1776, when she surrendered other claims within the charter limits of Maryland; but on the contrary, she expressly reserved 'the property of the Virginia shores or strands bordering on either of said rivers, (Potomac or Pocomoke) and all improvements which have or will be made thereon.' *By the compact of 1785, Maryland assented to this*, and declared that 'the citizens of each State respectively shall have full property on the shores of the Potomac, and adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements.'"

Thus this Commission, which this Court said was composed of eminent lawyers, (*Maryland vs. West Virginia*, 217 U. S. p. 579 of opinion), held that the Compact of 1785 was a concession by Maryland that its boundary did not extend beyond the low water mark on the Virginia side of the Potomac.

This Compact and its effect was before this Court in the case of *Maryland vs. West Virginia*, 217 U. S. 577. That case is a direct holding by this Court, that the Compact was a concession by Maryland of all claim beyond the low water mark on the southerly side of the River.

Decision of this Court in Maryland vs. West Virginia is Conclusive that the Compact of 1785 Had the Effect of Establishing the Boundary at Low Water Mark.

In the case of *Maryland vs. West Virginia*, the Court rendered two opinions: one in 217 U. S., p. 1, and the other at 217 U. S., p. 577. In that case the action had been instituted by Maryland against West Virginia in the Supreme Court of the United States to settle the boundary between the two States along the westerly line of Maryland. The so-called Deakin's Line, purporting to fix the western boundary of Maryland, had been established in 1787. This line established the head waters of the Potomac at Fairfax Stone, and ran north from that point. This line, while acceptable to Virginia, was not acceptable to Maryland, and long-continued controversy resulted.

In 1859, a new line was run for the State of Maryland, which fixed the head waters of the Potomac at Potomac Stone, a point farther West than Fairfax Stone, and ran north from that point. This left in dispute the territory between the two lines, one running North from Potomac Stone and the other running North from Fairfax Stone. In 1891, Maryland instituted the action against West Virginia, as an original proceeding in this Court, to have its boundary established at the Westerly line. West Virginia, in a cross-bill, asked to have the boundary between the two States established at the Deakins line, and also asked to have the boundary from Harper's Ferry to the Westerly boundary of Maryland established at the North bank of the Potomac River.

This Court, in the first decision, 217 U. S. 1, held

that the West Virginia-Maryland boundary began at Fairfax Stone rather than at Potomac Stone, thus finding in favor of West Virginia; and, second, the Court held that the boundary along the Potomac was not the North bank of that River but was the South bank, thus finding this issue in favor of Maryland. While this second finding determined that the boundary of West Virginia did not reach across the Potomac to the North bank, it left uncertain whether the true boundary was the low water mark or the high water mark on the Southerly side of the River.

After the first opinion, decrees were prepared by counsel: one for Maryland, which placed the boundary at the high water mark on the Southerly side of the Potomac River; the other, prepared by West Virginia, which placed the boundary at the low water mark.

The issue thus presented had not been determined by the Court in its first decision. Therefore, the second decision, found in 217 U. S. 577, was rendered. The Court in this second opinion held that the boundary between Maryland and West Virginia was the low water mark on the Southerly side of the Potomac. In reaching this conclusion, the Court referred to the arbitration award of 1877 between the States of Maryland and Virginia, and after stating that the award was made by eminent lawyers, quoted from the award as follows:

> "The evidence is sufficient to show that Virginia, from the earliest period of her history, used the South bank of the Potomac as if the soil to low water mark had been her own. She did not give this up by her Constitution of 1776, when she surrendered other claims within the

charter limits of Maryland; but on the contrary, she expressly reserved 'the property of the Virginia shores or strands bordering on either of said rivers (Potomac or Pocomoke), and all improvements which have or will be made thereon.' *By the compact of 1785, Maryland assented to this,* and declared that 'the citizens of each State respectively shall have full property on the shores of the Potomac, and adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements.'

* * * * * * * * *

"Taking all together, we consider it established that Virginia has a proprietary right on the south shore to low water mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a public highway.

"To that extent Virginia has shown her rights on the river so clearly as to make them indisputable."

After making the above quotation from the award, the Supreme Court continued:

"The compact of 1785 (see Code of Virginia, v. 1, title 3, ch. 3, Sec. 14, p. 16) is set up in this case, and its binding force is preserved in the draft of decrees submitted by counsel for both States. We agree with the arbitrators in the opinion above expressed, *that the privileges therein reserved respectively to the citizens of the two States on the shores of the Potomac are inconsistent with the claim that the Maryland boundary on the south side of the Potomac River*

shall extend to high-water mark. There is no evidence that Maryland has claimed any right to make grants on that side of the river, and the privileges reserved to the citizens of the respective States in the compact of 1785 and its subsequent ratifications indicated the intention of each State to maintain riparian rights and privileges to its citizens on their own side of the river.

"This conclusion gives to Maryland a uniform southern boundary along Virginia and West Virginia at low-water mark on the south bank of the Potomac River to the intersection of the north and south line between Maryland and West Virginia, established by the decree in this case. This conclusion is also consistent with the previous exercise of political jurisdiction by the States respectively.

"The decree will therefore provide for the South bank of the Potomac River at low-water mark on the West Virginia shore as the true southern boundary line of the State of Maryland."

Here is a direct holding by this Court that the Compact of 1785 is inconsistent with any claim on the part of Maryland that the boundary was the high water mark on the Virginia side, and that the Compact was a virtual concession by Maryland that the boundary was the low water mark.

Grants by Maryland and Virginia to the United States of the Territory Within the District of Columbia.

In 1788 the State of Maryland passed an act providing for the cession to the United States of an area ten miles square. In 1789 the State of Virginia passed a similar act. On July 16, 1790, Congress

passed an Act accepting a district or territory not exceeding ten miles square located on the Potomac River, and authorized the President to appoint commissioners to define the boundary of the District. In 1791 the commissioners were appointed and the ten miles were shortly thereafter selected. On December 17, 1791, Maryland passed an act ceding to the United States that portion of the ten miles square which lay within the boundaries of that State. This Act contained the following provision:

> "Provided that nothing herein contained shall be so construed to vest in the United States any right of property in the soil, so as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States."

Virginia also passed a similar statute ceding to the United States that portion of the ten miles so selected, the Virginia statute containing a similar proviso as to individual property rights.

Regrant by United States to Virginia:

On July 9, 1846, Congress passed an Act ceding to the State of Virginia the territory which Virginia had formerly ceded to it (9 Stat. L. Page 35), the language of this act being:

> "all of that portion of the District of Columbia ceded to the United States by the State of Virginia, and all the rights and jurisdiction therewith ceded over the same be, and the same are hereby, ceded and forever relinquished to the State of Virginia, in full and absolute right and jurisdiction as well of soil as of persons residing or to reside thereon."

It will be noted from the terms of this Act that the United States reconveyed or receded the exact territory which Virginia had formerly ceded to the Government. This left the status of the boundary entirely unaffected by such cession and recession. As expressed by Mr. Justice Holmes in the Marine Railway case (257 U. S. 47):

> "The original state of things was not changed by the grant of Virginia and the regrant by the United States of the part of the District on the Virginia side." (See page 63 of opinion.)

Grant by Maryland to the United States of Territory in District of Columbia Only Extended to Low Water Mark.

It is important to determine what part of the District of Columbia was acquired from Maryland and what part was acquired from the State of Virginia, because when Congress subsequently receded to Virginia the exact territory which Virginia had conveyed to the United States, the sole territory remaining a part of the District of Columbia was that which had been conveyed by the State of Maryland.

It is obvious that if the Compact of 1785 operated to fix the boundary between Maryland and Virginia at the low water mark on the Virginia side, as this Court held in the case of *Maryland vs. West Virginia*, then when Maryland conveyed to the United States in 1791, six years after the Compact was signed, it conveyed only to the low water mark. Manifestly Maryland could convey nothing with which it had already parted; therefore the conveyance from Maryland to the United States was limited by the low water mark on the Virginia side of the River.

It is equally true that when Virginia conveyed to the United States in 1791 that State's conveyance reached also to the low water mark on the Virginia side, and when the United States subsequently conveyed back to Virginia the exact territory which Virginia had conveyed, it necessarily conveyed back all the land beyond the low water mark on the Virginia side. These considerations determine that the present boundary between the District of Columbia and the State of Virginia is the low water mark on the Virginia side of the River.

No Decisions by this Court Which Conflict With Conclusion that Boundary is Low Water Mark.

We have already seen that this Court, in the case of *Maryland vs. West Virginia,* 217 U. S. p. 577, held that the Compact of 1785 in effect established the boundary between Maryland and Virginia at the low water mark on the Virginia side. While there has been a conflict in the decisions of other Courts as to the effect of this Compact and as to the boundary line between the District of Columbia and the State of Virginia, still there is no decision by this Court which is in any wise in conflicts with the decision in the case of *Maryland vs. West Virginia.*

Morris vs. United States, 174 U. S., 196.

The case most frequently cited in support of the contention that the boundary is the high water mark is *Morris vs. United States,* 174 U. S. 196. In this case it appeared that the Federal Government had reclaimed certain land in the bed of the Potomac River lying adjacent to the District of Columbia shore, the land being known as Potomac Flats. All

of the land involved in the case was located on the District of Columbia side of the River, far beyond the low water mark on the Virginia shore, so that the question of the boundary line between the District of Columbia and Virginia was not in issue. The Marshall heirs claimed this land through the grant to Lord Culpeper. The contention was that the Lord Culpeper Grant reached across the Potomac and included the tide land on the northerly side of the River.

The case had originally been tried in the Supreme Court of the District of Columbia and the opinion of Mr. Justice Hagner is reported in 23 Wash. L. Rep. 745. In considering the contention of the Marshall heirs, Mr. Justice Hagner referred to the Statute hereinbefore cited (1 Hennings Stat. Chap. 87), which extended the ownership of land to the low water mark, and said that it was—

> "a limitation fatal to a claim to any part of the soil in controversy in this cause, all of which lies on the north side of the Virginia channel and of course far beyond the low water mark on the Virginia shores of the river."

So that there can be no doubt that the boundary between Virginia and the District of Columbia was not in any way involved in that action.

It is true that this Court, at page 225 of the Opinion, said:

> "For, even if the latter be the correct view, we agree with the conclusion of the court below, that, upon all the evidence, the charter granted to Lord Baltimore, by Charles I, in 1632, of the territory known as the Province of Maryland,

embraced the Potomac River and the soil under it, and the islands therein, to high water mark on the southern or Virginia shore; that the territory and title thus granted to Lord Baltimore, his heirs and assigns, *were never divested by any valid proceedings prior to the Revolution; nor was such grant affected by the subsequent grant to Lord Culpeper.*"

This statement by the Court was entirely outside of any issue before the Court, and, so far as we can find, the question was not raised by any of the parties, nor was it presented in any argument to the Court. In any event, it was outside of any issue in the case and should be treated as pure dictum. *United States vs. Corbett*, 215 U. S. 238. That this statement of the Court that the grant to Lord Baltimore reached to high water mark was outside any issue in the case is practically conceded by petitioner in his Brief at page 12.

Unlikely that Grant to Lord Baltimore was Intended to Include Tide Lands on Virginia Side of River.

It seems hardly probable that the grant to Lord Baltimore was intended to not only include the whole of the Potomac River but even the shores of that River on the Virginia side. It is the usual situation that a country bounded by a river extends to low water mark, and it would be intolerable if the country on the other side should reach entirely across the river and extend to the high water mark on the other shore.

We note that counsel for the United States contend that where a stream divides two countries and the ownership of the stream belongs to one of them,

the ownership extends to the opposite bank as accessory to the use of the stream and *Hall's International Law* and *Moore's International Law Digest* are both cited to this effect. We do not think that these authorities mean to say that the ownership extends to the high water mark on the opposite shore of the River, but if that is what they mean, then they are exactly contrary to the decision of this Court in the case of *Hadley's Lessee vs. Anthony,* 5 Wheat. 374. In that case Chief Justice John Marshall said:

> "If, instead of an annual and somewhat irregular rising and falling of the river, it was a daily and almost regular ebbing and flowing of the tide, it would not be doubted, that *a country bounded by the river would extend to low-water mark. This rule has been established by the common consent of mankind. It is founded on common convenience.* Even when a state retains its dominion over a river which constitutes the boundary between itself and another state, it would be extremely inconvenient, to extend its dominion over the land on the other side, which was left bare by the receding of the water. And this inconvenience is not less, where the rising and falling is annual, than where it is diurnal. Wherever the river is a boundary between states, it is the main, the permanent river, which constitutes that boundary; *and the mind will find itself embarrassed with insurmountable difficulty, in attempting to draw any other line than the low water mark.*"

And again on page 383 of the Opinion the Court said:

> "If a river, subject to tides, constituted the boundary of a state, and at flood, the waters of

the river flowed through a narrow channel, round an extensive body of land, but receded from that channel at ebb, so as to leave the land it surrounded at high water, connected with the main body of the country; this portion of territory could scarcely be considered, as belonging to the state on the opposite side of the river, although that state should have the property of the river. *The principle, that a country bounded by a river, extends to low-water mark, a principle so natural, and of such obvious convenience as to have been generally adopted,* would, we think, apply to that case. We perceive no sufficient reason, why it should not apply to this."

In view of the foregoing it seems at least doubtful if the original grant to Lord Baltimore was intended to include the tide lands on the Virginia side, but, even assuming that this be true, it is certain that Virginia did not acquiesce in this claim but that it, from the earliest times, claimed the tide land as its own. It is also certain that Maryland, in the Compact of 1785, acquiesced in this claim, as this Court held in the case of *Maryland vs. West Virginia.* So that, even conceding that the grant to Lord Baltimore carried the boundary of Maryland to the high water mark on the Virginia side of the River, still that boundary was changed by the Compact of 1785 to the low water mark.

Further Consideration of Morris vs. United States, 174 U. S. 196.

There is nothing in the Morris case which conflicts with this conclusion. Much is made of the statement in the Morris case, that the grant to Lord Baltimore

reached to high water mark on the Southern or Virginia shore and—

> "that the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any valid proceedings *prior to the Revolution,* nor was such grant affected by the subsequent grant to Lord Culpeper." (See page 225 of opinion.)

The Court does not say that the Compact of 1785 did not change the boundary. It merely states that the grant was not affected by the grant to Lord Culpeper, which, of course, was obviously true, and also that the territory and title "were never divested by any valid proceedings prior to the Revolution."

By "valid proceedings prior to the Revolution" the Court undoubtedly meant valid legal proceedings in England to divest Lord Baltimore of his title. This term is elaborated more fully in the opinion of the trial court. Thus on page 750 of 23 Wash. L. Rep., Justice Hagner says:

> "There is no pretention that any consent was given (the consent of Lord Baltimore) or that any sentence or decree of divestiture was passed."

So that all this statement can possibly mean is that the original grant carried to the high water mark, and that there were no proceedings in England prior to the Revolution to annul Lord Baltimore's title.

The Court was not considering the Compact of 1785, nor the effect of that Compact upon the boundary line, because that Compact had been en-

tered into *subsequent* to the Revolution, not "prior to the Revolution." When this Court in a later case, did come to the consideration of the effect of the Compact of 1785 upon the boundary, it held that that Compact operated to fix the boundary at the low water mark (*Maryland v. West Virginia,* 217 U. S. 577).

Marine Ry. Co. vs. United States, 257 U. S. 47.

The second case upon which Petitioner largely relies is the Marine Railway case. That case involved only land which lay below the low-water mark on the Virginia side, and is therefore not in point here. The first sentence of the court's opinion is as follows:

> "This is a suit brought by the United States in the Supreme Court of the District of Columbia to recover possession of a strip of land on the Potomac River front of the City of Alexandria. Except an insignificant portion, as to which no special defense was made and which, it is agreed, may be disregarded, *this strip lay below the low-water mark* until it was filled in by the United States."

So that there can be no question that all the land in that case was below the low-water mark, and title to such land is conceded to be in the United States.

That the Supreme Court, in the Marine Railway case, did not intend to detract in the slightest degree from the decision in the West Virginia case is shown by the reference of the Court to that case. This is found on page 63 of the opinion, and is as follows:

> "That the original title of Maryland extended at least to *low-water mark on the Virginia side,*

it is now too late to deny, in view of the decisions in Maryland v. West Virginia and Morris v. the United States."

Again the Court said, on the same page:

"The former decisions of the Court must be followed as far as they go."

So that the Court not only did not intend to withdraw anything which had been decided in the West Virginia case, but on the contrary reaffirmed the decision in that case.

Referring to the Compact of 1785, the Court said:

"The compact between Virginia and Maryland in 1785 also seems to us to have no bearing upon the case."

Of course it had no bearing upon the case, because all the land involved in the case was below the low water mark. The Court had previously said that the original title of Maryland extended at least to low water mark. There was no acquiescence in that Compact on the part of Maryland that the title of the Virginia owners should extend below the low water mark, but only to the low water mark. So that, inasmuch as the land involved in the Marine Railway case was all below the low water mark, it is apparent that the Compact of 1785 could have no bearing upon the question as to who owned the land below the low water mark.

In referring to the Compact, the Supreme Court further said:

"It left the question of boundary open to long-continued disputes."

This is historically true because while, by the Compact of 1785, Virginia had conceded the tide lands on the north side of the River to Maryland, and Maryland had conceded the tide lands on the south side of the river to Virginia, still neither State had given up its claim to jurisdiction over the main part of the river. Moreover, there are numerous deep indentations on the Virginia side of the River, and Virginia did not relish the claim of Maryland to follow the low water mark along these indentations for miles into the interior of the State of Virginia, and so Virginia continued to claim jurisdiction over these indentations. Its right over these indentations, however, was not finally determined until the arbitration agreement of 1877, when the boundary was fixed at low-water mark from head-land to head-land, thus placing all the indentations in Virginia. Moreover, Virginia had also persistently claimed jurisdiction over the Potomac River, first over the whole River and later over half the River. (See Report of Joint Commissions, cited on page 26, petitioner's brief.)

The Supreme Court in the Marine Railway case was thus merely stating, as an historical fact, that the Compact of 1785 left the boundary open to future disputes, which, of course, it did. At the same time, the Supreme Court did not overrule the decision in the West Virginia case that by that Compact Maryland had waived all claim beyond the low-water mark on the Virginia side.

The Supreme Court further said in the Marine Railway case that the arbitration agreement of 1877,

which was accepted by the two States in 1878, did not affect the rights of the United States. Obviously, it could not have any such effect. The United States was not a party to that agreement. It did not purport to fix the boundary between Virginia and the District of Columbia, but only purported to fix the boundary between Maryland and Virginia where those States were contiguous. That Award fixed the boundary at low water mark from headland to headland, thus conceding Virginia's claim that it had jurisdiction over the indentations of the river on the Virginia side. The Supreme Court said that this did not give Virginia jurisdiction over the indentations opposite the District of Columbia, because the United States was not a party to the agreement, and the Award of 1877, granting Virginia jurisdiction over the indentations, could not affect the indentations opposite the District.

It must be remembered that the land involved in the Marine Railway case lay in the main bed of the Potomac River below the low water mark on the Virginia side. It must also be remembered that this land lay within an indentation on the Virginia shore, so that if the rule that the line ran from headland to headland were to be adopted, the land would have been within the State of Virginia. The Court held that the boundary of the District of Columbia extended at least to low water mark on the Virginia side and that the rule that the line should run from headland to headland did not apply to the District of Columbia because that rule was first established by the award of 1877, long after the rights of the United States had been fixed; also that the United States was not a party to that award and was there-

fore not bound by it. There is nothing whatever in the case which holds or even intimates that the boundary extends beyond the low water mark, the entire holding being that the boundary of the District of Columbia extends at least to the low water mark and that it does not follow the rule of running from headland to headland.

Decisions of Court of Appeals of District of Columbia Are Conflicting.

There are three cases decided by the Court of Appeals of the District of Columbia where the question of the boundary between the District and the State of Virginia has been considered. In two of these cases the Court of Appeals held that the boundary was the high water mark on the Virginia side. In the other case the Court held that the boundary was the low water mark.

The two cases in which the Court of Appeals held the boundary to be the high water mark are *Evans v. United States,* 31 D. C. App. 544, and *Herald v. United States,* 52 D. C. App. 147. The case in which the same court held the boundary to be the low water mark is the *Marine Railway* case, 49 D. C. App. 258, also reported in 265 Fed. 437.

In both the Marine Railway case and the Herald case, the District Court of Appeals undertook to interpret the decision of the Supreme Court in the case of Maryland v. West Virginia. In the Marine Railway case, concerning the Maryland v. West Virginia case, the Court of Appeals said:

> "In the recent case of Maryland v. West Virginia, 217 U. S. 577, 30 Sup. Ct. 63, 54 L. Ed.

888, the court, considering the award of 1878, by which the boundary between the states of Maryland and Virginia was fixed at the low-water line on the Virginia shore, held, in effect, that *this line had been established by the compact of 1785*. The United States was not a party to the award of 1878, and her status with respect to the boundary between the District of Columbia and Virginia was not involved. *However, as we interpret the opinion, it holds that the boundary was established at low-water mark by the Compact of 1785*, and, unless affected by the exercise of political jurisdiction by the United States, it *likewise fixes the boundary of the District of Columbia* as ceded by Maryland in 1789, four years after the compact, since whatever territory and right to the soil under the Potomac was ceded to the United States by Virginia in 1789 was receded in 1846."

Here is a clear statement by the Court of Appeals of the District that the Supreme Court had held in the case of Maryland v. West Virginia that the Compact of 1785 established the boundary at low water mark, and that that Compact also established the boundary of the District of Columbia at the low water mark, as Maryland's cession of the District to the United States was several years after the Compact was made.

In the *Herald* case, 52 D. C. App. 147, the Court of Appeals, apparently entirely overlooking what it had said in the Marine Railway case, said of the Maryland v. West Virginia case:

"The court in that case held that the State of Maryland extends only to the low water mark on the Virginia shore. This decision, however, was based chiefly upon the award of 1878, which

was later held in the Marine Railway case to have no application to the boundary between the District and Virginia."

How the Court of Appeals could have so misinterpreted the decision of this Court in the case of Maryland v. West Virginia, it is impossible to understand. The State of West Virginia was not a party to the award of 1877 and had nothing whatever to do with it. The arbiters did not purport to determine the boundary between West Virginia and Maryland, nor could they by any possibility have attempted to determine such boundary. An agreement between Maryland and Virginia, to which West Virginia was not a party, and was not even consulted, could not possibly have affected the boundary of West Virginia.

In the case of *Marine Railway v. United States*, 257 U. S. 47, this Court said that this award of 1877 could not affect the boundary between Virginia and the District of Columbia because the District had been created long prior to the agreement. By the same process of reasoning, the agreement of 1877 could not have affected the boundary between West Virginia and Maryland because West Virginia had been created and its rights fixed long prior to the agreement.

This Court did not make, and obviously would not have made, such a decision as the Court of Appeals said it made. That is, that an agreement between Maryland and Virginia made in 1877, long after the creation of the State of West Virginia, and to which agreement West Virginia was not even a party, fixed the boundary of the State of West Virginia. This

Court did not in any manner base its decision in Maryland v. West Virginia on the award of 1877. On the contrary, it based its decision entirely upon the Compact of 1785, which compact existed long prior to the creation of the State of West Virginia.

It is true that this Court, in the Maryland-West Virginia case, quoted at length from the arbiters' decision of 1877, but that was merely to approve the process of reasoning adopted by the arbiters in arriving at the conclusion that the boundary between Virginia and Maryland was fixed by the Compact of 1785 at the low water mark. The arbiters held that the Compact of 1785 fixed the boundary between Maryland and Virginia at low water mark, and this Court said that it agreed with the arbiters that the Compact of 1785 did so fix the boundary. This Court further held that, inasmuch as the Compact of 1785 was signed long prior to the creation of the State of West Virginia, that Compact fixed the boundary for the whole length of the contiguous portions of Maryland and Virginia as they existed in 1785, and that, therefore, West Virginia, which had been carved out of the State of Virginia subsequently to the Compact of 1785, must necessarily take the same boundary that had been the boundary of the State of Virginia prior to the creation of West Virginia.

By exactly the same process of reasoning it inevitably follows that the District of Columbia, which was created six years after the Compact of 1785, must take the same boundary which had been fixed by that Compact.

CONCLUSION.

The Compact of 1785 was a relinquishment by Maryland to Virginia of all claim beyond the low water mark on the Virginia shore. When Maryland conveyed to the United States in 1791, it therefore conveyed nothing beyond the low-water mark. When the United States, in 1846, reconveyed to Virginia exactly the same territory that Virginia had originally conveyed to the United States, it left the District of Columbia consisting solely of the territory originally granted by Maryland. As the original conveyance from Maryland was bounded by the low water mark on the Virginia side of the Potomac, it follows that the present District of Columbia is bounded by the same low water mark.

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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